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December 7, 2004

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12 Street, S.W.
Washington, D.C. 20554

Re: Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

This letter is written on behalf of the Association for Local Telecommunications Services, CompTel/ASCENT, Access Integrated Networks, Birch Telecom, Inc., BridgeCom International, DSCI Corporation, Eschelon Telecom, Inc., Grande Communications, Inc., InfoHighway Communications Corp., nii Communications, NuVox Communications, Talk America Inc., the PACE Coalition, SNiP LiNK, LLC and XO Communications, Inc. (the "Joint CLEC Coalition") to respond to the November 18, 2004, *ex parte* letter of SBC Communications, Inc. ("SBC"), in which SBC asks the Commission to establish rules applying its unbundled network element ("UNE") regulations adopted in the above-referenced proceedings automatically as of a date certain and without regard for the provisions in existing State Commission-approved interconnection agreements, including change-of-law provisions. As amplified herein, the Commission should reject this proposal to preempt in advance and run roughshod over provisions in State Commission-approved interconnection agreements, to almost all of which the incumbent local exchange carriers ("ILECs") voluntarily agreed. Instead, the Commission should take the opportunity make clear the circumstances in which its unbundling rules adopted in this proceeding apply. For new and successor agreements, the rules should form part of the statutory and regulatory backdrop in which the agreements are negotiated and arbitrated by State Commissions. For existing agreements, the change of law provisions, if any, in the carriers' agreements should be followed as they are for other regulatory changes.

As the Commission is well aware, the Telecommunications Act of 1996 (the "1996 Act") established a comprehensive framework whereby interconnection, collocation, and access to UNEs are governed by interconnection agreements negotiated between ILECs, such as SBC, and competitive local exchange carriers ("CLECs"). The legal obligations between an ILEC and a CLEC are governed by the parties' approved interconnection agreements, which incorporate the Commission's regulations. If the parties cannot agree on terms, either party may request State Commission resolution of the disputed provision(s) through arbitration under Section 252 of the Communications Act of 1934, as amended by the 1996 Act (the "Communications Act"). The statutory framework directs all interconnection agreements whether negotiated or arbitrated to be submitted to State Commissions for review and approval. While State Commissions are bound under the Communications Act to ensure that arbitrated provisions are consistent with the provisions of the Communications Act and the regulations of the FCC, negotiated provisions are not subject to this same standard.[1] Negotiated provisions must be approved provided they are not discriminatory and are consistent with the public interest. Case precedent makes clear that State Commission approval is required for amendments to approved interconnection agreements as well.[2]

When entering into their interconnection agreements, carriers, including ILECs as much as CLECs, face a choice. They may mutually agree to include – and negotiate – change of law provisions and, if so, may agree to one (or more) of several different types of change in law provisions, which may apply generally or only to one or more specific subject areas of the interconnection agreement. Most change of law provisions fall within one of two categories. Changes in the underlying law may be incorporated automatically into the agreement by virtue of the law's effectiveness and *without an amendment* to the agreement. The other common type of change in law provision is where changes are incorporated through negotiation of an amendment (or dispute

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1 As discussed herein, in addition to the Commission's regulations, approved interconnection agreements, including provisions regarding unbundling of network elements, may reflect other provisions of federal law as well as provisions of state law under Sections 251(d)(3), 252(e)(3), and 261(b) of the Communications Act.

2 *See, e.g., In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, 19343 (2002) (noting that amendments to interconnection agreements and new interconnection agreements must be filed with State Commissions under section 252(a)(1)). Moreover, ILECs, including SBC, have always insisted that CLECs wishing to opt into *approved* interconnection agreements under Section 252(i) of the Communications Act must take the agreement in its entirety, including any amendments thereto. If the agreement is to retain its *approved* nature after it has been amended, the amendments must also be submitted to the Commission and approved

resolution before the State Commission or another body if the parties cannot agree). Whichever type of change of law provision, if any, is present in two carriers' agreement, those provisions bind the parties for as long as the agreement remains in effect. The Commission has recognized this in its previous decisions regarding the ILECs obligations under the 1996 Act. Thus, for example, when the Commission ruled that intercarrier compensation for ISP-bound traffic was not governed under Section 251(b)(5) of the Act, and was instead subject to Commission, not State, jurisdiction under Section 201 of the Communications Act, the FCC said that, while the effectiveness of its interim rules implementing this ruling were triggered by federal register publication, the arrangements reflected in the rules would be implemented between ILECs and CLECs only as carriers entered into new or successor agreements, or pursuant to the change of law provisions within the interconnection agreements themselves. *See In the Matter of Implementation of Local Competition Provisions in the Local Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd 9151, 9189 (2001). Until such time, on a case-by-case basis, existing intercarrier compensation arrangements would remain in effect. Similarly, when the Commission issued its NPRM in this proceeding, it gave no indication that change of law provisions might not apply to implement the unbundling rules it is about to adopt in existing interconnection agreements. Further, with respect to changes in unbundling rules themselves, SBC itself, and other ILECs, have recently argued before the US Court of Appeals for the D.C. Circuit and the Supreme Court that existing change of law provisions contain "orderly procedures . . . to transition away from the current regime of maximum unbundling." Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, *United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012, June 1, 2004, at 15; *see also* Opposition of ILECs to Applications for Stay, *NARUC v. USTA*, Sup. Ct. Nos. 03-A1008 & 03-A1010, June 14, 2004, at 30-32. No longer willing to abide by the "orderly procedures," mostly voluntarily agreed to by SBC, SBC has filed an *ex parte* asking the FCC to simply override the change of law provisions in its existing agreements with CLECs.

The Commission must reject SBC's proposal on several grounds:

* The change in law provisions in most extant interconnection agreements were in general proposed *by the ILECs*, were voluntarily agreed to by CLECs *and ILECs*, and were *not* arbitrated. In fact, SBC and the other ILECs drafted and proposed these provisions with the intent and understanding that they would apply *in the very circumstances that SBC would now like to avoid*. The ILECs have, all during the period during

which today's interconnection agreements were negotiated and arbitrated, been challenging the legitimacy of the Commission's unbundling rules.[3]

* A Commission order rendering existing approved change of law provisions nugatory or to preempt State Commission decisions implementing the normal operation of the changes in law provisions – including Sate determinations to apply other federal or state requirements regarding unbundling – would be an unauthorized departure from the statutory framework of State Commission-approved negotiated or arbitrated interconnection agreements established by Congress in the 1996 Act.

* The requested relief would wrest, away, wholesale the authority of the State Commissions under Section 252 to arbitrate and approve agreements, subject only to District Court review. 47 U.S.C. §§ 252(b) and (e). Only under certain conditions where a state Commission fails to act to carry out these responsibilities may this Commission preempt and step in to arbitrate or approve agreements. *Id.* § 252(e)(5). Since the Commission has not even issued its final rules, it would be the height of speculation for the Commission to assume that the State Commissions will not act to enforce change of law provisions in the ILECs' agreements consistent with the Commission's regulations regarding unbundling adopted in this proceeding.[4] Conversely, adopting a ruling as requested by SBC, would have the FCC assume a role not set forth in the 1996 Act, or the Communications Act generally.[5]

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3 There is little doubt they will continue to challenge rules the Commission adopts in this proceeding to the extent unbundling is required.

4 In the *Notice*, the Commission noted that how change in law amendments would be implemented, and the standards that would apply to resolve disputes related to change in law processes, were a matter of speculation. *Notice* ¶ 17.

5 To the extent the ILECs might urge the Commission, as they have in the past, to look to the *Sierra-Mobile* doctrine as giving it the authority to ignore provisions of approved interconnection agreements governed by state law, the *Sierra-Mobile* doctrine is inapplicable because the agreement is *not* within the Commission's exclusive jurisdiction. *See FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1955); *United Gas Co. v. Mobile Gas Crop.*, 350 U.S. 332, 344 (1956). The States have explicit jurisdiction under the 1996 Act to arbitrate and approve interconnection agreements, and to ensure that arbitrated provisions (when the ILEC and CLEC cannot agree) are consistent with the substantive provisions of the 1996 Act and the Commission's regulations. Further, the *Sierra-Mobile* doctrine applies only where the agreements at issue are filed with the federal government and are subject to its plenary authority;

* While it is true that State Commissions are not free to *mis*interpret federal law, they may use their procedures to interpret it when arbitrating and approving interconnection agreements, State Commissions, when arbitrating and approving interconnection agreements and amendments under Section 252, may act to ensure that the agreements and amendments reflect not only federal law, but also State regulation policy and regulations, including those reflecting State-derived unbundling requirements. *See* 47 U.S.C. §§ 251(d)(3) (state adopted unbundling requirements), 252(e)(3) (state commissions, when approving interconnection agreements, may establish or enforce requirements of state law), and 261(b) (state adopted pro-competitive requirements). Change of law amendment procedures allow State commissions to determine if state law or other provisions of federal law might warrant retention of an unbundling in whole or in some modified form following a Commission decision to decline to require unbundling under Sections 251(c)(3) and 251(d)(2) of the Communications Act. A Commission rule that preempts in advance any departure from the Commission's Section 251(c)(3) and 251(d)(2) determinations would not only be utterly premature, it would overstep the Commission's authority and render meaningless the aforementioned provisions of the Communications Act.

* A Commission rule directly or indirectly overriding change of law amendment provisions in existing interconnection agreements, even if otherwise lawful, would go beyond the scope of the *Notice* in this proceeding and would be barred by the Administrative Procedures Act. The *Notice* nowhere proposed rules to override the change of law provisions in existing interconnection agreements and, in fact, assumed that such change of law provisions would apply, as explained herein. The terms of the interconnection agreements whose change of law provisions would be affected, or rather ignored, are not even part of the record in this proceeding. As the Commission noted in the *Notice*, such provisions "vary widely," and the Commission cannot purport to change them without notice to the parties that would be affected that offers those parties an opportunity to be heard regarding the features of particular provisions.

Section 252 interconnection agreements are filed with the State Commissions. 47 U.S.C. § 252(a). Moreover, as noted above, the Commission only can assume this jurisdiction and authority under the 1996 Act where a State Commission fails to act. 47 U.S.C. § 252(e)(5).

SBC has confused the FCC rules taking effect with the situation where *all* interconnection agreements perfectly reflect the regulations.[6] The scenario where different carriers, under their various agreements, because of their different expiration or termination dates or differing change in law provisions (or the lack of change in law provisions altogether), are over time subject to different arrangements regarding UNEs is not in any way inconsistent with the 1996 Act. Indeed, given the regulatory framework dependent on separately negotiated and/or arbitrated agreements, which may be entered into at different times, and a changing underlying regulatory landscape, it is to be expected that changes in law will be implemented over the universe of carriers in an irregular pattern over some duration of time. The alleged "delays" in implementation of previous Commission rulings of which SBC complains in its November 18 *ex parte* are simply the product of the regulatory framework established by Congress. SBC's complaint is neither with their competitors who are entitled, under some interconnection agreements, to *bona fide* disagreements over the content, meaning and scope of changes in law, nor with the State Commissions who carry out their responsibilities to arbitrate disputes and enforce interconnection agreements as written and approved. Rather, the ILECs' complaint, if they have one, is with Congress. Thus, only Congress can fix the problem that SBC perceives, by radically altering the existing statutory framework, not this Commission.

The Commission can continue, as it has in the past, to direct CLECs and ILECs, as well as State Commissions, to act promptly to implement change in law amendments or, in the case of the ILECs, amend their tariffs or statements of generally available terms, or SGATs, to reflect changes in law. The Commission can remind carriers, both ILECs and CLECs, to be careful when reaching negotiated interconnection arrangements. But the Commission cannot and should not rescue SBC and the other ILECs from the consequences of portions of their interconnection agreements which they either negotiated voluntarily or which they arbitrated unsuccessfully, or failed to have reversed in subsequent proceedings on review.[7] If, in fact, State Commissions in specific

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6 Notably, arbitrated change of law provisions in *existing* agreements, are not subject to a continuing requirement under Section 252 that they be consistent with Sections 251 and 252 of the Communications Act and the FCC's regulations. Further, voluntarily negotiated change of law provisions are not subject to this standard at all.

7 To the extent the Commission adopts transition measures for the elimination of certain UNEs, [carrier(s)] expect that many, if not all, change of law proceedings may be completed in advance of the transition periods being complete. Thus implementation of the FCC's rules into those agreements subject to change in law amendment procedures is not likely to lag behind the effectiveness of the FCC's rules. In any event, the newly adopted rules, once effective, will apply to arbitration of new and successor agreements right away.

situations, subsequent to the issuance of orders in this proceeding, fail to carry out or abuse their statutory obligations to arbitrate and review amendments subject to the change of law provisions of existing interconnection agreements, SBC and the other ILECs may request the FCC to preempt in particular cases under Section 252(e)(5). Until then, the Commission should not presume the inability of existing change of law provisions to provide for "orderly procedures" toward the integration of the rules adopted in this proceeding into the universe of interconnection agreements approved under the current statutory framework. SBC's proposals in its November 18, 2004, *ex parte* letter should be rejected.

Sincerely,

Brad E. Mutschelknaus

cc: Christopher Libertelli
Matthew Brill
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